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No. 86-1815

In The

Supreme Court of the United States

October Term, 1986

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CREDIT BUREAU SERVICES—NEW ORLEANS, d/b/a CHILTON CORPORATION,

Petitioner,

versus

THOMAS K. PINNER

Respondent.

—o—

CHILTON'S REPLY MEMORANDUM IN SUPPORT OF ITS PETITION FOR WRIT OF CERTIORARI FROM THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

—o—

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May It Please The Court:

In his response to Chilton's[1] petition for certiorari, respondent Pinner has not addressed, much less countered, the reasons why review by this Court is essential to the national credit industry. Rather, Pinner has presented a litany of non-issues in an apparent effort to sidetrack this Court's attention from the circuit court's erroneous anal-

[1] Borg-Warner Corporation is the parent company of Chilton Corporation; Borg-Warner Corporation is not a party to this proceeding.

ysis of the Fair Credit Reporting Act. Chilton is constrained to submit this reply to identify the factual and legal misstatements contained in Pinner's response. Ironically, Pinner's response underscores the need for granting certiorari, thereby permitting this Court to rectify a decision that could permanently damage the national banking and consumer credit industry.

It is particularly noteworthy that Pinner's response does not mention the accuracy defense under the Fair Credit Reporting Act. As explicated in its petition, Chilton has raised the Fifth Circuit's glaring error of imposing liability for dissemination of an accurate credit report. The Fifth Circuit's ruling below clashes with controlling decisions by the Fifth Circuit, Eleventh Circuit, Third Circuit, and the D. C. Circuit, and, cannot be reconciled with this Court's approval of the Third Circuit's decision in *Todd v. Associated Credit Bureau,* 578 F.2d 1376 (3d Cir. 1978), *cert. denied,* 439 U.S. 1068 (1979). Unable to respond to the reasons warranting review by this Court, Pinner argues that there is no nexus between his debt to the Sherwin-Williams Company (which was accurately reflected in his credit report) and Chilton's alleged failure to comply with the Fair Credit Reporting Act. Such an argument is nonsense. Pinner's reply egregiously fails to address the critical issue which begs for certiorari review, *i.e.*, that if credit information is correct, and the circuit court concluded that the Sherwin-Williams credit information on Pinner was truthful, the case law, until the ruling below, uniformly held that a credit reporting agency could not be held liable for reporting accurate credit information. Chilton's Petition at p. 3. Pinner concedes that he was indebted to Sherwin-Williams, and he

does not challenge the Fifth Circuit's finding that he was delinquent in paying his debt to Sherwin-Williams. Chilton's credit report was limited to this accurate information, namely, Pinner's delinquent debt owed to Sherwin-Williams. Yet, Pinner convolutedly suggests that his admitted delinquent debt has no bearing upon Chilton's compliance with the FCRA. This illogical response to Chilton's petition is transparent. In short, Pinner has not offered a single judicial decision that can explain away the Fifth Circuit's decision, which conflicts with every other circuit addressing the accuracy defense under the FCRA.

Besides dodging the questions requiring review by this Court, Pinner alludes to matters that are simply not at issue in this case. For example, Pinner devotes considerable attention to the tangent of differentiating between disputed and delinquent accounts under the Fair Credit Billing Act, 15 U.S.C. § 1666a(a), but Pinner fails to recognize that the Fair Credit Billing Act is not an issue in this petition. Indeed, it is difficult to understand how discussion of this statute could be germane since Pinner has not even asserted a claim against Chilton under this statute. Such misleading arguments by Pinner, even if unintentional, should be stricken by this Court, since they are simply irrelevant to this Court's consideration of Chilton's petition. *See*, Supreme Court Rule 34.6.

Similarly, Pinner devotes an entire section in his response lambasting James Schmidt, who is not even a party to this proceeding. This section, like Pinner's other commentary, fails to disclose any ground why the questions presented by Chilton do not merit certiorari review, which is required by Rule 22 of the Rules of this Court. Pinner's

diatribe against James Schmidt, a non-party to this proceeding, should not obscure the fact that Pinner has been unable to refute the several bases presented by Chilton for exercising certiorari review and correcting the circuit court's unprecedented errors.[2]

Rather than confront the issues warranting review by this Court, Pinner devotes his response to parroting his arguments to the court below, which were summarily rejected by the Fifth Circuit and which are not issues in this petition. Respondent's refusal to meet head-on the issues in Chilton's petition is telling. Quite obviously, the Fifth Circuit's departure from the case law under the FCRA is indefensible.

This Court should grant certiorari for four reasons:

(1) The court below erroneously found liability under the Fair Credit Reporting Act notwithstanding

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[2] As noted in its petition, when Chilton verified Pinner's Sherwin-Williams' account at Pinner's request Chilton contacted James Schmidt, who was the highest officer and manager of the Sherwin-Williams store at which Pinner maintained his store credit account. Petition at p. 10, n. 7. It is not disputed that Schmidt was the most knowledgeable Sherwin-Williams employee regarding Pinner's account. But this is another red-herring tossed into Pinner's pool of irrelevant arguments. The threshold questions presented for review by Chilton are (1) whether the accuracy of Pinner's credit report precluded a judicial inquiry into the reasonableness of Chilton's procedures, as the Act and the cases mandate, and (2) whether the Fifth Circuit is free to amend the Fair Credit Reporting Act by judicial fiat. The Fifth Circuit ruled that the contents of Chilton's credit report were accurate; yet, contrary to this Court's position in *Todd v. Associated Credit Bureau, supra,* which affirmed the Third Circuit's stance on the accuracy defense under the FCRA, the Fifth Circuit imposed liability upon Chilton. Pinner has conveniently failed to squarely address the Fifth Circuit's errors.

the fact that the challenged credit report was found to be accurate;

(2) The Fifth Circuit's decision below is the only instance in which accuracy does not preclude liability under the FCRA, and, as a result of the Fifth Circuit's anomalous decision, a conflict exists among circuit courts as to the accuracy defense under the Fair Credit Reporting Act;

(3) This case raises an important question as to what constitutes verification under the Fair Credit Reporting Act; and

(4) The decision below has far-reaching ramifications in the credit reporting industry and has the effect of rewriting the Fair Credit Reporting Act.

Pinner has not responded to any of the reasons that merit certiorari review. Pinner does not refute the accuracy defense, he does not refute that there is a conflict among the circuits, he does not refute that this case raises important questions as to verification under the Fair Credit Reporting Act, nor does he refute that the decision below has far-reaching adverse ramifications in the credit reporting industry and has the effect of rewriting the Fair Credit Reporting Act.[3] An authoritative interpretation of the FCRA has yet to be rendered by this Court. The present petition provides this Court with a propitious and needed opportunity for resolving major issues that affect the entire credit reporting industry and impact the millions of consumers using credit each day.

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[3] As noted in Chilton's Petition for Certiorari, "[w]ith approximately 200,000,000 consumers, credit grantors utilize more than 850,000 consumer reports each day to facilitate the extension of credit." Petition at p. 32. Accuracy is a touchstone in credit reporting procedures, but the Fifth Circuit's decision will discourage accurate credit reporting.

The need for plenary review of the Fifth Circuit's decision is indisputable. Because of the paucity of case law in this area, the erroneous decision rendered by the Fifth Circuit in the instant case has a disparate detrimental impact upon jurisprudential interpretation of the Fair Credit Reporting Act. Unless this Court grants certiorari, the Fifth Circuit's erroneous ruling will only breed new judicial errors which will impair the availability of consumer credit throughout the United States.

For the foregoing reasons and for the reasons set forth in its original petition, Chilton respectfully submits that its Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I have on this 12th day of June, 1987, served three copies of the foregoing reply memorandum upon the following, by placing same in the United States mail, properly addressed and first class postage prepaid:

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